CONWELD ENGINEERING SDN BHD & ORS v. GOH SWEE BOH & ANOR

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
S NANTHA BALAN JCA
GHAZALI CHA JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-849-05-2019]
27 SEPTEMBER 2022

Abstract – *The tort of collateral abuse of process is a distinct tort to cater for the conduct of a party which abuses the court's process for ulterior or collateral purposes rather than to seek legal remedy as provided by law. In circumstances where it had been demonstrated, on a balance of probabilities, that a plaintiff had filed a suit, not for the genuine purpose of obtaining the requisite reliefs permissible by law but for a collateral purpose of obtaining some other advantages, then such a situation might find cause of action in the tort of collateral abuse of process.*

TORT: *Abuse of process – Position in Malaysia – Whether tort of collateral abuse of process should continue to be recognised as distinct cause of action – Whether Malaysian courts ought to follow decision of Singapore Court of Appeal in Lee Tat Development Pte Ltd v. Management Corporation Of Grange Heights Strata Title Plan No. 301*

TORT: *Abuse of process – Elements – Whether elements of tort of abuse of process established – Whether process complained of initiated – Whether purpose for initiating process other than to obtain genuine redress which process offers – Whether claimant suffered damage or injury in consequence*

The first respondent was the founder of the first appellant ('company'). The second and third appellants, who were brothers ('Low brothers'), later joined the company and the first respondent brought in his son, the second respondent. The Low brothers held 65% shares while the first and second respondents ('Goh family') held 35% shares in the company. The relationship between the Low brothers and the Goh family deteriorated and this culminated into the resignation of the first defendant as the chairman and the removal of the second defendant as a director of the company. The Goh family offered to sell their shares but the Low brothers rejected their proposal. The Goh family then filed a petition, at the High Court, to wind up the company but the Low brothers were not named as parties to the petition. The Goh family proceeded to file, and was successful, *ex parte* applications to obtain orders (i) for the appointment of the interim liquidator

of the company; and (ii) to restrain the company and/or its bankers from, *inter alia*, dealing with the company's money in its bank accounts ('orders'). The orders were only served on the company two weeks later. The company filed an application to set aside the orders and the High Court allowed the application; the orders were set aside and the petition was struck out with liberty to file afresh. The High Court further concluded that the company had not proven that it suffered substantial damages and awarded nominal charges of RM5,000 with no order as to costs. The company did not appeal against the decision and the respondent did not file a fresh petition against the company. The appellants then filed a suit against the Goh family, at the High Court, on the basis that the filing of the petition and the orders were a manifestation of the tort of collateral abuse of process. The High Court Judge ('HCJ') dismissed the claim on the grounds that (i) the tort of collateral abuse of process was a distinct cause of action and had a role to play especially in cases where it was not open or feasible to the defendant to apply for striking out of the proceedings against it, pursuant to O. 18 r. 19 of the Rules of Court 2012 ('ROC'). The HCJ declined to follow the route taken by the Singapore Court of Appeal in *Lee Tat Development Pte Ltd v. Management Corporation Of Grange Heights Strata Title Plan No. 301* ('*Lee Tat*'); (ii) the Goh family had filed the petition and obtained the orders for the predominant purpose of putting pressure on the Low brothers to buy their shares at the price that they demanded; (iii) the company had not suffered any damages by reason of the filing of the petition and/or the orders; and (iv) since damage was an essential element for the cause of action, the company failed to establish the cause of action for abuse of process. Hence, the present appeal by the appellants and the cross-appeal by the Goh family. The questions that arose for the court's determination were: (i) whether the time has come for Malaysian courts to follow *Lee Tat*; and (ii) whether the tort of collateral abuse of process should continue to be recognised as a distinct cause of action.

Held (dismissing appeal and cross-appeal with no order as to costs)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The court was not inclined to take the route taken by the Singapore Court of Appeal in *Lee Tat*. There was no reason to depart from the decision of the Malaysian Court of Appeal in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* ('*MBSB*') which recognised the tort of collateral abuse of process as giving rise to a distinct cause of action. Based on *MBSB*, the essential elements for the tort of abuse of process were: (i) the process complained of must have been initiated; (ii) the purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked

must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and (iii) the plaintiff must have suffered some damage or injury in consequence. (paras 43 & 44)

(2) In circumstances where it has been demonstrated, on a balance of probabilities, that a plaintiff had filed a suit not for the genuine purpose of obtaining the requisite reliefs permissible by law but was instead filed for a collateral purpose of obtaining some other advantage, to extort the defendant, to put pressure on the defendant or to extract a benefit from the defendant, then such a situation might found cause of action in the tort of collateral abuse of process. The Malaysian courts should, in a fit and proper case, continue to recognise the tort of collateral abuse of process to cater for the conduct of a party which abuses the court's process for ulterior or collateral purposes rather than to seek legal remedy as provided by law. The tort of collateral abuse of process should be recognised as a distinct tort. (paras 52-54)

(3) The real question that arose was whether the company had established all the elements for the tort of abuse of process and, in so far as the Low brothers were concerned, whether they had the requisite *locus standi* to sue for the tort of abuse of process with reference to what took place in the petition. The HCJ ruled against the appellants on both questions. There was no reason to disagree with the HCJ. Based on the evidence, it could not be said that the HCJ's conclusion upon the evidence was plainly wrong. There was no appealable error to warrant any appellate interference. (paras 83 & 84)

Case(s) referred to:

Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors [2011] 5 CLJ 481 FC ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Conweld Engineering Sdn Bhd & Ors v. Goh Swee Boh & Anor [2019] 1 LNS 580 HC ***(refd)***
Crawford Adjusters & Ors v. Sagicor General Insurance (Cayman) Ltd & Anor (Cayman Islands) [2014] AC 366 ***(refd)***
Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC ***(refd)***
Goldsmith v. Sperrings Ltd [1977] 2 All ER 566 ***(refd)***
Grainger v. Hill (1838) 4 Bing NC 212 ***(refd)***
KE Hilborne v. Tan Tiang Quee [1972] 1 LNS 49 ***(refd)***
Lee Tat Development Pte Ltd v. Management Corporation Of Grange Heights Strata Title Plan No. 301 [2018] SGCA 50 ***(not foll)***
Lim Chee Kuo v. The Pacific Bank Bhd [2009] 1 LNS 654 CA ***(refd)***
Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(foll)***
Re Bellador Silk Ltd [1965] 1 All ER 667 ***(refd)***
Re Majory [1955] 2 All ER 65 ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 346, 465(1)(f), (h)
Rules of Court 2012, O. 18 r. 19(1)(d)
Rules of the High Court 1980, O. 18 r. 19

For the appellants - Saw Wei Siang, Ling Hua Keong & Audrey Chong Pei Ying; M/s Ranjit Singh & Yeoh
For the respondents - Rishwant Singh & Chia Eng Yi; M/s Cecil Abraham & Partners

[Editor's note: For the High Court judgment, please see Conweld Engineering Sdn Bhd & Ors v. Goh Swee Boh & Anor [2019] 1 LNS 580 (affirmed).]

Reported by Najib Tamby

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This appeal is essentially concerned with the tort of collateral abuse of process. The tort arises in situations where the court process is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral or ulterior purpose. In those circumstances, the legal action could be regarded as an abuse of process.

[2] The elements which are necessary for the tort of collateral abuse of process are (i) the court action must be initiated, (ii) the dominant purpose of filing the action must be to obtain a collateral advantage or it must be for some purpose other than to obtain genuine redress which the process offers, and (iii) the defendant must have thereby suffered damage. See: The Court of Appeal's decision in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425, [1998] 2 AMR 1666 (CA) ("*MBSB*").

[3] In this appeal, the question is whether the tort of collateral abuse of process should continue to be recognised as a distinct cause of action, and whether the time has come for the Malaysian courts to follow the route that was taken by the Singapore Court of Appeal in *Lee Tat Development Pte Ltd v. Management Corporation Of Grange Heights Strata Title Plan No. 301* [2018] SGCA 50 ("*Lee Tat*") which resulted in the demise of the tort of collateral abuse of process in that jurisdiction.

The Appeal

[4] This is an appeal by the plaintiffs against the post-trial decision of the learned judge of the High Court dated 15 April 2019 dismissing the plaintiffs' claim *via* Kuala Lumpur High Court Suit No: WA-22NCC-197-05-2018 ("suit 197") with costs of RM50,000. The defendants filed a cross-appeal.

[5] The judgment of the High Court is reported at: [2019] 1 LNS 580; [2019] MLJU 1359; [2019] AMEJ 0422 (HC). For convenience and consistency, we shall refer to the appellants and respondents as "plaintiffs" and "defendants" respectively.

Parties

[6] The second plaintiff (Low Terk Chen) ("P2") is the younger brother of the third plaintiff (Low Man Fook) ("P3"). The first defendant (Goh Swee Boh @ Goh Cheng Kin) ("D1") is the father of the second defendant (Goh Tze Chien) ("D2"). The first plaintiff in Suit 197, namely, Conweld Engineering Sdn Bhd shall be referred to as "the company".

[7] For all intents and purposes, D1 is the founder of the company. P2 later joined the company and was given shares. D1 described himself as P2's "teacher" and that P2 was his "protege". P2 brought in his elder brother, P3. P3 was given shares in the company.

[8] As part of the process of succession, D1 brought in his son, D2. D2 was given shares in the company. P2 and P3 held 65% of the shares in the company whereas D1 and D2 ended up as minority shareholders cumulatively holding 35% shares in the company. Thus, the final shareholding position is P2 and P3 ("Low brothers") held 65% of the shares in the company, and D1 and D2 ("Goh family") held 35% shares in the company. P2 and P3 were in the driver's seat and they managed the company. The defendants had no role in the management of the company.

The Problem

[9] There were serious differences between the Low brothers and the Goh family. The relationship between the Low brothers and the Goh family deteriorated. P2 went so far as to convene an emergency general meeting to remove D1 as a director of the company.

[10] On or about 12 December 2014, D1 resigned as the chairman and director of the company in order to avoid the ignominy of being "removed" as a director of the company which he had founded. On 30 June 2017, D2 was removed as a director of the company.

[11] In the period between 2015 and 2016, there was an agreement between D1 and P2 for the sale of D1's remaining 300,000 shares in the company to P2 for a total consideration of RM1,890,000. At the same time, there was also an agreement between P2 and D2 for the sale of D2's entire shareholding in the company for RM4.80 per share. However, both agreements were not carried out. Subsequently, in or around October 2017, D1 and D2 offered to sell their shares at RM10 and RM7.68 respectively (exclusive of the newly issued rights shares at par value of RM1). An initial offer to purchase part of P2 and P3 shares was not accepted by P2 and P3. P2 and P3 rejected the defendants' proposal to sell their shares at RM10 and RM7.68 per share.

Winding-Up Petition

[12] On or about 13 December 2017, the defendants *qua* shareholders of the company, filed a petition to wind up the company *via* Kuala Lumpur High Court Winding-up Petition No: WA-28NCC-832-12-2017 ("the petition") under s. 465(1)(f) and 1(h) of the Companies Act 2016.

[13] Section 465(1)(f) reads as follows:

> (f) the directors have acted in the affairs of the company in the directors' own interests rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members;

[14] Section 465(1)(h) reads as follows:

> (h) the Court is of the opinion that it is just and equitable that the company be wound up;

The Ex Parte Orders

[15] P2 and P3 were not named as parties to the petition. On or about 21 December 2017, the defendants proceeded to file *ex parte* applications to obtain:

(i) an order for the appointment of Dato' Narendrakumar Jasani a/l Chunilal Rugnath as the interim liquidator of the company ("PL order"); and

(ii) an order restraining the company and/or its bankers from *inter alia* dealing with the company's money in its bank accounts ("*Mareva* order").

(collectively referred to as "the orders").

[16] On 26 December 2017, the defendants obtained the orders. The interim liquidator was appointed pursuant to the PL order. The orders, though obtained on an urgent and *ex parte* basis, were only served on the company two weeks later on 9 January 2018.

[17] The company filed an application to set aside the orders ("setting aside application") on 12 January 2018 and sought a hearing of the same on an urgent basis. The defendants, through their counsel, objected to the hearing of the setting aside application and sought adjournments on several occasions.

Petition – Struck Out

[18] On 28 February 2018, after the defendants' solicitors discharged themselves, the court allowed the setting aside application and set aside the orders. The court also struck out the petition with liberty to file afresh. The company asked for costs on an indemnity basis but this was rejected by the learned judge. P2 and P3 had participated in the proceedings as contributories. They too asked for costs, but this was rejected.

A **Assessment Of Damages**

[19] Pursuant to the defendants' undertaking to pay damages given as a condition for the orders, the court ordered an assessment of the damages that the company had sustained as a consequence of the PL order and the *Mareva* order. On 29 October 2018, after a hearing, the learned High Court Judge
B Justice Datuk Noorin Binti Badaruddin ("Justice Noorin") concluded that the company had not proven that it had suffered substantial damages and awarded nominal damages of RM5,000 with no order as to costs. The company did not appeal against Justice Noorin's order. The defendants did not file a fresh winding-up petition against the company.

C **Suit 197**

[20] On 28 May 2018, the company, P2 and P3 filed Suit 197 against the defendants on the basis that the filing of the petition and the orders were a manifestation of the tort of collateral abuse of process per the Court of
D Appeal's decision in *MBSB*.

[21] In Suit 197, the plaintiffs had sought the following reliefs:

- Special damages of RM267,300.00 being the legal costs incurred by the second and third plaintiffs;
- E General damages to be assessed;
- Aggravated damages and/or exemplary damages to be assessed;
- Interest on the amount of damages found due by the defendants to the plaintiffs at such rate and for such period as this Court deems just;
- F Costs; and
- Any other reliefs that are fit and just.

The Judge's Decision

[22] After a full trial, the judge dismissed the claim which was predicated
G on the tort of collateral abuse of process. The judge declined to follow Lee Tat and held that under Malaysian law, the tort of collateral abuse of process is a distinct cause of action and had a role to play especially in cases where it is not open or feasible to the defendant to apply for striking out of the proceedings against it pursuant to O. 18 r. 19 of the Rules of Court 2012.

H **[23]** The judge ruled that in the instant case the defendants had filed the petition and obtained the orders for the predominant purpose of putting pressure on P2 and P3 to buy the defendants' shares at the price that they had demanded.

I **[24]** The judge held that the defendants had no valid explanation for the delay in effecting service of the orders. The judge also made a finding that the company had not suffered any damages by reason of the filing of the petition and/or the orders.

[25] And since damage was an essential element for the cause of action, the judge held that the company had failed to establish the cause of action for abuse of process. The judge also held that since damages were assessed by Justice Noorin, *res judicata* applies and the company may not resurrect the issue of damages *via* Suit 197.

[26] This is how the judge put it:

> [74] However, it is significant to point out that there was an assessment of damages to ascertain what loss and damage the company had sustained as a result of the PL order and the *Mareva* order and the plaintiffs or rather the company had sought substantial damages from the defendants during the assessment of damages exercise. However, Justice Noorin who heard the matter obviously found that the company had not proved it had suffered substantial damages as she only awarded nominal damages of RM5,000.00 with no order as to costs. I am of the view that, since the aim of the assessment of damages exercise was to ascertain what, if any, damages the company had suffered as a consequence of the PL order and the *Mareva* order, the question of damages is *res judicata* and it is not open to the plaintiffs to now allege that the company had sustained any damages as a consequence of the orders.
>
> [75] Consequently, the relief claimed in the present action attract the doctrine of *res judicata*.

[27] Before us, the plaintiffs contended that the judge was wrong in relying on *res judicata* as the assessment of damages was in relation to the orders which were set aside, and the court did not assess damages consequent upon the filing of the petition.

[28] In so far as P2 and P3 are concerned, they claimed that they had paid legal costs in the sum of RM228,430 in order to defend the petition and set aside the orders. They contend that these payments were proven.

[29] But the judge declined to award these legal costs as damages in favour of P2 and P3, as they had no cause of action under the tort of abuse of process as they were not named as parties in the petition.

[30] In dismissing P2 and P3's claim, the judge ruled as follows:

> [59] The first observation to be made is that the petition was initiated by the defendants against the company only. The second and third plaintiffs were not sued by the defendants and so the winding up petition was not commenced against them. Consequently, the petition cannot be said to constitute an abuse of the court process as against the second and third plaintiffs. The plaintiffs disagree with this proposition and submitted that there is no authority to say that a claimant claiming on this tort must be named as a party in the process initiated. At the same time, there is no authority to support the plaintiffs' contention that the second and third plaintiffs can sue for the tort of abuse of process even though they were not named as respondents in the winding up petition. I am of the view that unless the proceedings were initiated against the defendant, the particular defendant cannot sue for the tort of abuse of process.

A

Our Decision

[31] The origin of the tort of abuse of process can be traced to the decision of the court of common pleas in *Grainger v. Hill* (1838) 4 Bing NC 212. In that case, Tindal CJ said *inter alia*, at p. 221 that the tort is established if "the process of the law has been abused to effect an object not within the scope B of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause."

[32] It is also profitable to refer to Lord Sumption's erudite dissenting judgment in *Crawford Adjusters & Ors. v Sagicor General Insurance (Cayman) Ltd C & Anor (Cayman Islands)* [2014] AC 366, [2013] 6 Costs LO 826, [2013] UKPC 17, [2013] WLR(D) 229, [2013] 4 All ER 8, [2013] 3 WLR 927, [2014] 1 AC 366 ("*Crawford*").

[33] In *Crawford*, Lord Sumption said at [149] that the essence of the tort D is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. Lord Sumption explained "predominant purpose" as the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought. He went on to say that "The paradigm case is the use of the E processes of the court as a tool of extortion, by putting pressure on the defendant to do something wholly unconnected with the relief, which he has no obligation to do".

[34] We turn now to the defendants' contention that the Malaysian courts should cease to recognise the tort of collateral abuse of process as a distinct tort.

F **[35]** The judge's approach to the issue of whether the Malaysian court should follow *Lee Tat* and refuse to recognise the tort of abuse of process as a distinct cause of action under Malaysian law, may be gathered from the following parts of her grounds of judgment:

> G [40] Next is as to whether the tort of abuse of process of the Court has been recognised by our Courts as a distinct tort. The answer to this is a resounding yes.
>
> [41] The tort of abuse of process was recognised by the Court of Appeal in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Bin Ungku Mohamed* [1998] 2 CLJ 340; [1988] 5 MLJ 425 and in *Lim Chee Kuo* H *v. The Pacific Bank Bhd* [2009] 1 LNS 654; [2011] 5 MLJ 230.
>
> [42] The tort of abuse of process was also recognised as a separate and distinct tort in the following High Court cases:
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> (a) In Civil Suit No. WA-22NCC-326-09/2016 between *Malpac Capital Sdn Bhd and Yong Toi Mee & Ors*;
>
> I (b) In Civil Suit No. 23 NCVC-56-2011 between *Noor Haslina Binti Abdullan v. Celcom Axiata Berhad*; and
>
> (c) In *Learnergy Sdn Bhd & Anor v. Abdul Jalil bin Othman* [2019] 7 MLJ 348.

[43] I agree with the submission advanced for the plaintiffs that it is inaccurate to say that the Court of Appeal's decision on the tort of abuse of process in *Malaysian Building Society Bhd* was merely *obiter dicta*. In that case, the appellant initiated bankruptcy proceedings against the respondent which resulted in the making of receiving and adjudicating orders. The respondent took out a motion to set aside these orders. He also asked for other relief including an order that damages be paid by the petitioning creditor to the debtor. The said relief for damages was granted by the High Court. Hence, the appeal to the Court of Appeal.

[44] The Court of Appeal allowed the appeal. It had been held that the proper process for the respondent to obtain relief for damages was to initiate an action for abuse of process. This is what the Court of Appeal had held:

> It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages. What has happened here is that the respondent short-circuited the methodology for obtaining relief. He has without proving a single element of the tort, obtained damages of more than RM2m. I am unaware of any such authorities, indeed none have been cited before us that enables such a result to be intended by the law. To all this, Mr Thangaraj argues that his client would be put to great hardship and will suffer severe prejudice. He says that his client is 75 years old and has already given evidence once and subjected to rigorous cross-examination. He should not be exposed to the hazards of another litigation. My respectful response to that argument is that the respondent is the author of his own misfortune. Had he followed the correct steps available to him he would not find himself in this position.

[45] Thus it is clear that the Court of Appeal recognised the distinct tort of collateral abuse of process.

[46] As against this, the defendants relied on the reasons given by the Singapore Court of Appeal in *Lee Tat Development Pte Ltd v. Management Corporation of Grange Heights Strata Title Plan No. 301* [2018] SGCA 50 for refusing to recognise the tort of abuse of process as a distinct cause of action under Singapore law. This is what the Singapore Court of Appeal said:

> Reasons of policy
>
> Finality and floodgates
>
> [151] As mentioned (see [104]-[108] above), extending the tort of malicious prosecution to the civil context generally would undermine the principle of finality in the law, in that this would encourage unnecessary satellite litigation and drag out disputes. In our view, the same consideration weighs against the recognition of the tort of abuse of process, which, like malicious prosecution, would largely be pleaded in the context of "fresh litigation about prior litigation".

A ...

[153] In our view, the danger remains that recognising the tort of abuse of process would encourage satellite litigation and prolong disputes, particularly among parties who have animosity between them. In this regard, we reiterate our earlier observations
B concerning litigation and its capacity to bring out the unpleasant side of human nature (see [116] above). In light of this, it is almost certain that many claims in abuse of process, if the tort were recognised, would take the form of unmeritorious, vindictive attempts, and this would ultimately result in the wastage of the court's time and resources.

C [154] We have also noted (at [110]-[112] above) that there is the closely related danger of opening the floodgates of litigation. Recognising the tort of abuse of process would also open the courts to the same variety of claims that would arise in respect of malicious prosecution in the civil sphere. Once the abusive
D institution of legal proceedings is recognised as capable of giving rise to tortious liability, why would the boundaries of the tort end there? Logically, a claim for abuse of process might be founded not only on the institution of civil proceedings, but also any step taken within civil proceedings for a predominant purpose other than that for which that step was designed (*Crawford Adjusters* ([5] *supra*) at
E [149]).

...

Chilling effect

[156] Further, as noted above in relation to the extension of the
F tort of malicious prosecution, recognising the tort of abuse of process may create a chilling effect on regular litigation. Litigants considering commencing civil proceedings would need to be mindful of the risk that they may be sued or found liable for abuse of process. Of course, to some extent, the potential chilling effect is addressed and limited by the fact that a claim in abuse of process
G is rather difficult to establish, even in jurisdictions where the tort is recognised. That is clear from the survey we have undertaken at [140]-[147] above. Yet, like malice, abuse of process may be "far more often alleged than proved" (per Lord Sumption's remarks on the tort of malicious prosecution in *Crawford Adjusters* at [148]) and in such cases, "[t]he vice of secondary litigation is in the attempt"
H (*Crawford Adjusters* at [148]). In other words, despite the difficulty of successfully claiming in abuse of process, recognising the tort may still carry a chilling or deterrent effect because litigants may be deterred by the threat or possibility of being sued for abuse of process.

I Availability of a remedy

[157] Finally, as we have demonstrated with respect to malicious prosecution at [120]-[122] above, one policy reason weighing against the recognition of the tort of abuse of process is that there

> are other remedies available to address the problem of abusive litigation. There exists - for the vast majority of cases - a system of various rules of civil procedure which deal precisely with various aspects of abuse of process of the court. Such rules permit a defendant to apply to the court to prevent such abuse - often well before the claim concerned has progressed significantly within the court's system. Where the facts support a suggestion that the plaintiff is abusing court processes for an ulterior purpose, the defendant may apply to the court to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action or as being frivolous or vexatious or as otherwise constituting an abuse of process. Conversely, where the defendant's conduct of his case constitutes an abuse of process, the plaintiff can, for example, apply for summary judgment against the defendant pursuant to O. 14 of the Rules.

[47] Persuasive as those reasons stated above are, I am not prepared to hold, considering the present state of the authorities in Malaysia, that Malaysia does not recognise the tort of abuse of process as a distinct cause of action. Especially in cases where it is not open or feasible to the defendant to apply for striking out of the proceedings against it pursuant to Order 18 rule 19 of the Rules of Court 2012, the tort of abuse of process still has a role to play.

[48] It can also be noted that despite the disapproval of the Singapore Court of Appeal (contrary to other jurisdictions) to extend the tort of malicious prosecution and abuse of process generally to civil proceedings, the Court nevertheless recognised that such tort is available for specific types of civil proceedings [at [84] of the report] such as:

(a) Improper procuring in the first instance of *ex parte* interlocutory orders by the party initiating the proceedings, the effect of which is to inflict immediate and perhaps even irreversible damage to the reputation of the party (at [77] of the report);

(b) Bankruptcy and winding up proceedings because the legal requirement of advertisement places the petitioner in the position to inflict irreversible damage on the other party by unilaterally and publicly impugning his credit and reputation before the petition was heard on the merits (at [78] of the report).

[49] In the present case, it was further submitted for the defendants that there was no valid reason given by the plaintiffs as to why they did not apply to strike out the petition under Order 18 rule 19 of the Rules of Court 2012.

[50] Although the courts are slow to entertain striking out applications in respect of winding up petitions, there are exceptions to this general rule, namely, where the petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or an abuse of process.

[36] At para. [51], the judge also referred to the Federal Court's decision in *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors* [2011] 5 CLJ 481; [2011] 5 MLJ 521 ("*Blue Valley*"). In *Blue Valley*, the Federal Court

A enunciated, that an application made pursuant to O. 18 r. 19 of the RHC to strike out a petition presented under s. 218 of the Act is undesirable and should be discouraged.

> In our view, the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course, we are
B not saying that it is totally inapplicable.

[37] The Federal Court went on to say that:

> There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case,
C O. 18 r. 19 could be resorted to.

[38] In the present case, the judge concluded at para. [56] that:

> ... the *dicta* in the abovesaid cases set out the general rule. It is settled law that the courts frown upon the practice of applying to strike out winding
D up petitions under Order 18 rule 19 of the Rules of Court 2012 because that will generally delay the hearing of the winding up petition. In this case, I note that the plaintiffs were involved in applying to set aside the PL Order and the *Mareva Order* on an urgent basis. Furthermore, if the company had suffered damages and losses as a consequence of the filing of the winding up petition, those losses and damages could not be
E claimed in a striking out application but the company would have to file a separate action claiming such losses and damages. I would not therefore dismiss the plaintiffs' claim simply on the basis that they could have but did not file a striking out of the winding up petition.

[39] The judge also alluded to the judgment by Justice Shankar in *Gasing*
F *Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695, [1996] 3 MLJ 259, [1996] 3 AMR 3001 (HC) ("*Gasing Heights*"), where he quoted a passage from Lord Scarman's judgment in *Goldsmith v. Sperrings Ltd* [1977] 2 All ER 566 (CA) @ p. 583 where he said:

> *Men go to law to redress a grievance. They may not know or understand the limits*
G *of the remedies provided by law – though no one suggests that the plaintiff's advisers could be said to suffer from ignorance of the law. But equally a man, while pursuing the remedies offered by law, may negotiate, to secure by agreement with the parties sued, terms more favourable than, or different from, what he would get in the absence of agreement. Such a negotiation, undertaken by properly advised parties, each of whom may have a legitimate interest in avoiding litigation and may be prepared to*
H *concede more than the law requires of them to achieve that end, does not necessarily mean that the plaintiff by his litigation is reaching out to secure a collateral advantage.* (emphasis added)

[40] The judge also quoted the following passage from *Gasing Heights* where reference was made to Evershed MR in the case of *Re Majory* [1955] 2 All
I ER 65 where he said at p. 78, that the phrase "collateral advantage", "manifestly cannot embrace every advantage sought or obtained by a litigant

which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose on an unwilling defendant.

[41] In the same case, Evershed MR went on to say,

> *In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject- matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain, but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation. Can he on that ground be debarred from proceeding? I very much doubt it.*
>
> (emphasis added)

[42] In the present case, on the point of delay in effecting service of the order, the judge said:

> [64] And in respect of the Orders obtained by the defendants, the unexplained delay of two (2) weeks in effecting service of the Orders on the company was inexcusable. If the matter was so urgent and there was such a real risk of dissipation of assets that the defendants had to proceed to obtain the Orders on an *ex parte* basis, there is simply no reason given as to why there was a delay of two (2) weeks in effecting service on the company of the Orders. The second defendant's evidence on this point does not explain the delay.

[43] In so far *Lee Tat* is concerned, our position is that we are not inclined to take the route that was taken by the Singapore Court of Appeal. We agree with and endorse the approach that was taken by the judge and see no reason to depart from the decision of the Court of Appeal in *MBSB*. In *MBSB*, the Court of Appeal recognised the tort of collateral abuse of process as giving rise to a distinct cause of action. At pp. 434 to 435 (CLJ); p. 435 (MLJ) the Court of Appeal said:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process to enforce some claim which he perceives he has against another. *When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process.* Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, *the party injured may bring an action based on the tort of collateral abuse of process.*
>
> (emphasis added)

[44] Based on *MBSB*, the essential elements for the tort of abuse of process are:

(i) the process complained of must have been initiated;

(ii) the purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

(iii) the plaintiff must have suffered some damage or injury in consequence.

[45] The defendants contend that the plaintiffs ought to have filed an application to strike out the petition based on abuse of process under O. 18 r. 19 of the Rules of Court 2012. It was argued that Suit 197 was itself a manifestation of an abuse of process.

[46] We are aware that in *Lim Chee Kuo v. The Pacific Bank Bhd* [2009] 1 LNS 654; [2011] 5 MLJ 230 (CA) Low Hop Bing JCA said (p. 237):

> As a general rule, a litigant who is a party to civil proceedings who claims that those proceedings are an abuse of process must take that objection in those very proceedings under O. 18 r. 19(1)(d). The filing of a collateral action is itself an abuse of process which must result in it being struck out at p. 275E. With particular reference to the facts in the instant appeal, we are of the view that the debtor's filing of this collateral action against the bank is itself an abuse of process which could have resulted in it being struck out *in limine*, had the bank taken the necessary steps for this purpose.

[47] But we note that the Court of Appeal's decision in *MBSB* was not referred to or quoted in *Lim Chee Kuo*. In *Gasing Heights*, Shankar J (as he then was) said that "a litigant who is a party to civil proceedings who claims that those proceedings are an abuse of process must take objection in those very proceedings under O. 18 r. 19(1)(d). The filing of a collateral action as was done in this case was itself an abuse of process which must result as happened here in its being struck out." It may be noted that *Gasing Heights* was decided before the Court of Appeal's decision in *MBSB*.

[48] Be that as it may, we think that in the instant case the judge was right to hold at [47] that the cause of action for the tort of collateral abuse of process should be recognised as a distinct and separate tort and that this is particularly critical where it is not open or feasible to the defendant (in the impugned suit) to apply for striking out of the proceedings against it pursuant to O. 18 r. 19 of the Rules of Court 2012. The judge said that in such circumstances, the tort of collateral abuse of process still had a role to play.

[49] Indeed, in the instant case, the parties were engaged in the preliminary stage of the litigation and were applying to set aside the orders which were obtained on an *ex parte* basis. In the meanwhile, the solicitors for the

petitioner discharged themselves and as it turned out, the petition was struck out. Thus events had overtaken the plaintiffs and there was no opportunity to utilise the O. 18 r. 19 ROC route to bring the petition to an end.

[50] Further, in a winding-up petition, it is procedurally impossible for those opposing the petition to mount a counterclaim to seek damages for the tort of collateral abuse of process.

[51] Finally, there is the Federal Court case of *Blue Valley*, which enunciated that for winding-up petitions, the court will generally decline to entertain a striking out under O. 18 r. 19 ROC as that only tends to delay the disposal of the petition.

[52] In our view, in circumstances where it has been demonstrated on a balance of probabilities that a plaintiff had filed a suit not for the genuine purpose of obtaining the requisite reliefs permissible by law, but was instead filed for a collateral purpose of obtaining some other advantage or to extort the defendant or to put pressure on the defendant or to extract a benefit from the defendant, then such a situation might found a cause of action in the tort of collateral abuse of process.

[53] In our opinion, just as the courts in several other common law jurisdictions have done, the Malaysian courts should in a fit and proper case, continue to recognise the tort of collateral abuse of process to cater for the conduct of a party which abuses the court's process for ulterior or collateral purposes rather than to seek legal remedy as provided by law.

[54] As such, we agree with the judge in recognising the tort of collateral abuse of process as a distinct tort. For the reasons stated above, we respectfully decline the defendants' invitation to follow the route taken by the Singapore courts per *Lee Tat* in refusing to recognise the tort of collateral abuse of process as a distinct tort.

[55] The next point is whether the plaintiffs had abandoned their pleaded case by reason of their failure to specifically confront D2 during cross-examination that the petition was filed for the collateral purposes of forcing P2 and P3 to buy the latter's shares in the company at the price demanded by the defendants.

[56] The defendants cited *Browne v. Dunn* [1893] 6 R 67 to argue that the plaintiffs' failure to put their case to D2 is fatal. But the judge trawled through the evidence and found that D2 was duly challenged in respect of the purpose for which they filed the petition and the applications.

[57] In answer to the suggestion that the petition was not filed for a genuine purpose, D2 replied that they as shareholders were merely exercising their rights. Further D2 acknowledged that he knew that the plaintiffs' case was about abuse of process.

[58] It is beyond doubt that whether the petition was filed for a predominant purpose, is pre-eminently a question of fact for the judge to decide. Here, the judge had carefully and comprehensively evaluated the evidence and made a finding of fact that the defendants had abused the court process in filing the winding-up petition when their real or predominant intention was to obtain a fair value for their shares, and in refraining from effecting service of the PL order and the *Mareva* order on the company for two weeks without any valid explanation.

[59] It is trite that it is an abuse of process if a winding-up petition is filed for a collateral purpose.

[60] In this regard, we may quote from the decision of Evershed MR in *Re Majory* [1955] 2 All ER 65 where he said:

> ... if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject-matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain, but there is, I think, a difficult area in between.

[61] In *Re Bellador Silk Ltd* [1965] 1 All ER 667 at p. 672A-B Plowman J said in respect of a petition to wind up a company:

> ... A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the Court, and it is primarily on that ground that I would dismiss this petition.

[62] The principle was also explained by Lord Denning in *Goldsmith v. Sperrings Ltd* [1972] 2 All ER 566 at p. 574:

> In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

[63] In *Re Majory* (*supra*) Evershed MR explained that the phrase "collateral advantage" manifestly "cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him". He said, "actions are settled quite properly every day on terms which a court could not itself impose on an unwilling defendant".

[64] In the circumstances, the question for the judge was whether on the basis of the pleadings, the documentary and oral evidence that was presented at the trial, the company had established that the petition was filed and the orders were obtained for a collateral advantage, *ie*, for an ulterior purpose not related to the petition and but for that ulterior purpose, the petition would not have been filed.

[65] In this regard, having regard to all the circumstances leading up to the filing of the petition, and the contents of the petition particularly those paragraphs dealing with the defendants' complaint that they had been making futile attempts to engage with P2 and P3 to prevail upon them to purchase the defendants' (35%) shares in the company and in particular D2 answers per his witness statements and answers during cross-examination, the judge went on to hold that the plaintiffs had established that the defendants filed the petition for the predominant purpose of resolving the so-called "deadlock' and to get a fair price for their shares.

[66] It is necessary to add that the phrase "deadlock" was quite obviously not a deadlock in management but rather it was just a stalemate or impasse between the defendants and P2 and P3 in regard to the sale of shares by the former to the latter.

[67] Essentially, it was obvious from a plain reading of the petition that there was deep resentment and frustration on the part of the defendants because of their inability to sell their shares in the company to P2 and P3. The defendants took the position that there was an "agreement" between the parties for the purchase of the shares. But they chose not to sue on the so-called "agreement". They also chose not to file an action under s. 346 of the Companies Act 2016 in order to precipitate a share buy-out at fair value. According to the defendants they were within their legal rights to file the petition.

[68] As far as the judge was concerned, it was quite clear that the predominant purpose for the filing of the petition was for the defendants to obtain a higher price for their shares in the company. In this regard, D2's evidence is quite telling. D2 said that they would not have filed the petition if P2 and P3 would agree to buy their shares at RM10 and RM7.68 respectively.

LHK : If at that time they are willing to transact the price at ... transact the sale and purchase of the shares for your father and yourself, at that price quoted by you that means you don't even need to file petition. Correct?

GOH : Why would we need to file a petition if the dispute can be resolved? There are many ways to resolve a dispute.

[69] In his witness statement, D2 said:

> Q3: What transpired following the breakdown of relationship?
>
> A: Previously, sometime in 2015, the second plaintiff and my father concluded a verbal agreement that the second plaintiff would purchase my father's remaining shares in the 1st plaintiff at the fixed price of RM6.30 per share. However this agreement was never concluded.
>
> Following our removal as directors of 1st plaintiff, my father and I once again tried to negotiate with the second plaintiff on several occasions to amicably resolve our dispute.
>
> Sometime in 2017, in an attempt to resolve the deadlock amicably, my father and I offered to purchase the shares of the second plaintiff and the third plaintiff ("Offer to Purchase"). The second plaintiff and the third plaintiff rejected the Offer to Purchase.
>
> Thereafter, my father and offered to sell our shares in the 1st plaintiff on the same terms as our initial Offer to Purchase ("Offer to Sell"). However, the Offer to Sell was also rejected by the second and third plaintiffs.
>
> Following the second and third plaintiffs' refusal to accept the Offer to Purchase and the Offer to Sell, we were at an impasse.
>
> As we had attempted to amicable resolve the matter to no avail, my father and I were compelled to file the Companies Winding-up Petition No. WA-28NCC-832-12/2017 (the "petition") against the 1st plaintiff on 13.12.2017.
>
> We filed the petition in order to resolve the deadlock between the parties and in order to obtain a fair price for the shares of the 1st plaintiff.

[70] It is trite that legally there can only be two possible outcomes in a winding-up petition. The petition is either dismissed, or the company is wound up. The winding-up court has no power to order a share buy-out. This is because a share buy-out is not a remedy within the purview of s. 465(1)(h) and (f) of the Companies Act 2016.

[71] On the other hand, under s. 346 of the Companies Act 2016 the court may order a share buy-out. The judge's findings on the predominant purpose for the filing of the petition and the orders that were obtained may be gleaned from the following paragraph in the grounds of judgment:

> [61] In the present case, the defendants had stated that they filed the winding up petition in order to resolve the deadlock and to obtain fair value for their shares. But there is no option for the court to order a share buy out in a winding up petition. Although it might not be oppressive for the defendants to hope that perhaps by way of negotiations they can obtain a fair value for their shares, however, in this case, the defendants did not try to enter into negotiations with the company. Instead, the

> defendants filed the two (2) *ex parte* applications and obtained the PL Order and the *Mareva* Order. I am of the view that if the defendants were really interested in obtaining a fair value for their shares, they should have filed an oppression action instead and pray for a compulsory share purchase order instead of resorting to the drastic remedy of filing a winding up petition. Alternatively, the defendants could have pursued a claim in contract for specific performance of the agreement for the sale of their shares (which agreement was alleged to exist by the defendants).

[72] But, despite holding that the petition was filed for the predominant purpose of putting pressure on P2 and P3 to purchase D1 and D2's shares at the price that they were demanding or expecting, the judge went on to hold (correctly) that it is an essential element of the tort of abuse of process that the plaintiffs must prove that the company has suffered damage as a result of the abuse of process. In this regard, the judge found that the company did not suffer any loss or damage as a result of the petition.

[73] Counsel said that even if the company was not able to prove substantial damages, the High Court should have allowed nominal damages. We think that this is predicated on a flawed argument. The fact that damages have not been proven means that the cause of action in the tort of abuse of process falls by the way side.

[74] It is trite that damage is an essential component for the tort of collateral abuse of process. In that regard, it is quite similar to the cause of action in negligence. Thus, unlike a claim for breach of contract, a claim in negligence will fail if damages are not proven. This is because there can be no claim for negligence, unless it is proven that there was duty of care, a breach of that duty and damages suffered as a result of that breach. (See: *KE Hilborne v. Tan Tiang Quee* [1972] 1 LNS 49; [1972] 2 MLJ 94 at pp. 98 to 99 CA – Singapore).

[75] Likewise, a claim under the tort of abuse of process will fail if damages are not proven. There is no room for nominal damages. At the end of the day, it is clear that at the trial of Suit 197, regardless of the issue of *res judicata* the company was not able to prove that it had sustained any damages consequent upon the filing of the petition and/or the grant of the orders.

[76] As far as the impact of the orders are concerned, Justice Noorin concluded that the company was not able to establish that they caused any damages to the company. In fact, P2 was confronted with the company's letter to its customers, suppliers and business associates dated 6 February 2018 and he conceded that there was no impact to the company's operations and it was business as usual.

A Dear valued customers/suppliers/business associates

We refer to the recent court advertisement that stated that Mr Goh Cheng Kin and Mr Goh Tze Chien had jointly filed a petition to wind-up Conweld Engineering Sdn Bhd(herein after refer to as "company"). We would like to state that these two petitioners are shareholders in our B company and together they have 35% shareholding.

We further inform that as members of the company's Board of Directors, we are currently working with our lawyers to resolve the legal matter for the best interest of all shareholders in this company. We shall keep you informed of the court decision in due course. We also reiterate that **our business and operation of the company is not affected** and we will C **continue to provide you the same level of sales & after sales service**. All our supplies from our **suppliers both local and overseas are also not affected**. We will continue to serve you & maintain our cordial trade relationship that exist all this while.

(emphasis added)

D **[77]** Before us, it was argued that the said letter was merely to placate the customers, suppliers and business associates. Even if that be the case, the company must still establish a causal link between the petition and any damage which may have resulted from the public or their business associates, suppliers, customers *etc*, coming to know of the existence of the petition. E Having combed through the record, we find nothing to support the company's claim for damages.

[78] We turn next to P2 and P3. The judge concluded that P2 and P3 had paid legal costs in the sum of RM228,430 which they had claimed as part of the damages. But the judge ruled that P2 and P3 are not entitled to claim F these amounts as damages under the tort of collateral abuse of process as they were not parties in the petition and had no cause of action for purposes of the tort of collateral abuse of process. We agree with the judge's ruling that the second and third plaintiffs have no cause of action for the tort of abuse of process as they were not a party to the petition.

G **[79]** Hence, even if they had participated in the petition proceedings as contributories and paid the necessary legal expenses to defend the petition and/or to set aside the orders, these are not recoverable under the guise of tort of abuse of process.

H **[80]** We were not persuaded by counsel's argument that the fact that P2 and P3 were entitled to appear in the petition as contributories gives them the requisite *locus standi* to prosecute a claim based on the tort of abuse of process.

I **[81]** No doubt, P2 and P3 were the target of the petition and in particular the orders. They would have faced committal proceedings if they had breached the orders. And they are the parties to whom the defendants were seeking to sell the shares. But, it does not follow that just because the petition

was in pith and substance a shareholder's fight with the company being a nominal party, that the said shareholder who has not been named as a party to the petition can later mount a claim based on the tort of abuse of process.

[82] According to the defendants, Suit 197 is a disguised appeal against the High Court's order dated 28 February 2018 in regard to the court's refusal to make any order of costs on an indemnity basis *vis-a-vis* the company or any costs at all in favour of P2 and P3 as contributories who had participated in the petition proceedings.

[83] In our view, the question is not whether Suit 197 is a disguised appeal. Instead, the real question is whether the company has established all the elements for the tort of abuse of process and in so far as P2 and P3 are concerned, whether they have the requisite *locus standi* to sue for the tort of abuse of process with reference to what took place in the petition.

[84] The judge ruled against the plaintiffs on both these questions. We find no reason to disagree with the judge. In our view, based on the evidence led during the trial, it cannot be said that the judge's conclusion upon the evidence was plainly wrong. Having considered the matter carefully and having due regard to the comprehensive written submissions and the extensive oral clarification before us, we find that there is no appealable error to warrant any appellate interference in this case.

[85] In our view the judge, having considered all the evidence, was fully entitled to reach her evaluative judgement as per the grounds of judgment. Although the parties before us have criticised the judge's approach and reasoning, we are not persuaded that the judge's approach was erroneous, the reasoning flawed or the conclusions wrong.

[86] Before we conclude, it is necessary for us to state, for the avoidance of doubt, that the High Court's finding that the petition was filed with predominant purpose of resolving the so-called "deadlock" and to achieve a sale of the shares at a fair price is not to be equated to a finding *sub-silentio* that the petition was unsustainable or unmeritorious.

[87] The allegations made in the petition have not been tested. In fact, the judge had expressly indicated in her grounds of judgment at para. [78] that the petition has not be heard on its merits and that the defendants are at liberty to refile the petition sans any predominant purpose.

[88] Finally, we must place on record our appreciation to counsel for their in-depth research and the assistance which they have given us.

[89] The appeal and cross-appeal are hereby dismissed. We exercise our discretion and make no order as to costs for the appeal and cross-appeal.